87-254

NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DAVID W. SMITH, III,
Appellant,

v.

JAMES G. MARTIN, in his capacity as Governor of the State of North Carolina; LACY H. THORNBURG, in his capacity as Attorney General of the State of North Carolina; FRANKLIN E. FREEMAN, JR., in his capacity as Director of the Courts of the State of North Carolina; TIMOTHY L. PATTI; ROBERT W. CLARK; and WILLIAM J. ALLRAN, III,
Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

I. WHETHER A STATUTE WHICH REQUIRES POLITICAL AFFILIATION AS A CONDITION FOR APPOINTMENT TO A JUDICIAL VACANCY VIOLATES THE FIRST AND FOURTEENTH AMENDMENT RIGHTS OF A CANDIDATE WHO IS OTHERWISE ELIGIBLE.

II. WHETHER THE CONSTITUTION AND LAWS OF NORTH CAROLINA CREATE A PROPERTY INTEREST IN ALL QUALIFIED VOTERS IN BEING ELIGIBLE FOR STATE OFFICE.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID W. SMITH, III,

Appellant,

v.

JAMES G. MARTIN, in his capacity as Governor of the State of North Carolina; LACY H. THORNBURG, in his capacity as Attorney General of the State of North Carolina; FRANKLIN E. FREEMAN, JR., in his capacity as Director of the Courts of the State of North Carolina; TIMOTHY L PATTI; ROBERT W. CLARK; and WILLIAM J. ALLRAN, III,

Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

David W. Smith, III, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit entered on April 2, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit (appendix A) is unpublished, Smith v. Martin, No. 86-2134 (4th Cir. filed Apr. 2, 1987). The opinion of the District Court is unpublished, Smith v. Martin, No. 86-0040-M (W.D. N.C. filed Aug. 1, 1986).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on April 2, 1987. An order denying appellant's petition for rehearing was entered May 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The fourteenth amendment to the United States Constitution reads, in pertinent part:

> No state shall...deprive any person of life, liberty or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

2. The first amendment to the United States Constitution reads, in pertinent part:

> Congress shall make no law...abridging the freedom of speech...or the right of people peaceably to assemble...[.]

3. N.C. Gen. Stat. § 7A-142 states:

> A vacancy in the office of district judge shall be filled for the unexpired term by appointment of the Governor from nominations submitted by the bar of the judicial district. If the district court judge was elected as the nominee of a political party, then the district bar shall submit to the Governor the names of three persons who are residents of the district who are duly authorized to practice law in the district and who are members of the same political party as the vacating judge; provided that if there are not three persons who are available, the bar shall submit the names of two persons who meet the qualifications of this sentence. If the district bar fails to submit nominations within thirty days from the date the vacancy occurs, the Governor may appoint to fill the vacancy without waiting for nominations.

4. N.C. Const. art. VI, § 6, provides:

> **Eligibility to elective office.** Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office.

5. N.C. Const. art. VI, § 8 , provides:

> **Disqualifications for office.** The following persons shall be disqualified for office:
>
> First, any person who shall deny the being of Almighty God.
>
> Second, with respect to any office that is filled by election by the people, any person who is not qualified to vote in an election for that office.
>
> Third, any person who has been adjudged guilty of treason or any other felony against this State or the United States, or any person who has been adjudged guilty of a felony in another state that also would be a felony if it had been committed in this State, or any person who has been adjudged

> guilty of corruption or malpractice in any office, or any person who has been removed by impeachment from any office, and who has not been restored to the rights of citizenship in the manner prescribed by law.

6. N.C. Const. art. IV, § 10, provides, in pertinent part:

> District Judges shall be elected for each district for a term of four years, in a manner prescribed by law....Vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.

STATEMENT OF THE CASE

This petition for certiorari seeks review of the Fourth Circuit's decisions upholding North Carolina's statutory eligibility requirement of political party affiliation to fill a judicial vacancy. Pursuant to the North Carolina statute, petitioner David W. Smith, III, was ineligible pursuant to the North Carolina statute, in a local bar election to fill a state district court vacancy solely because of his party affiliation.

N.C. Gen. Stat. § 7A-142 dictates that upon a vacancy in a district court slot, the local bar meet to nominate three persons, each of whom must be of the same political party as the vacating judge. The Governor then appoints a judge from among the three bar nominees.

Following the announced resignation of a Democratic judge, at the meeting of the local bar only nominations of Democratic candidates were sought or received. Smith, a Republican, was ineligible under the statute for nomination.

Prior to the Governor's appointment, Smith brought suit in federal district court seeking declaratory and injunctive relief on the grounds that the political affiliation requirement deprived him of his rights to free speech and freedom of association pursuant to Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), and Branti v. Finkel, 445

U.S. 507, 100 S. Ct. 1287, 67 L. Ed. 2d 574 (1980), and denied him his state-created right to be eligible for office without due process or equal protection of the laws. Defendants Patti, Clerk and Allran were the three Democratic candidates nominated to the Governor by the local bar. The district court had jurisdiction pursuant to 28 U.S.C. § 1343(3), (4), § 1331(a), and 42 U.S.C. § 1973(c).

The district court granted summary judgment for defendants, relying heavily on this court's ruling in Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982), which upheld the filling of legislative vacancies based on a party affiliation. The court also interpreted

---

[1] The complaint also alleged that the statute at issue had never been precleared as required by section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c). Subsequent to the filing of the complaint, the statute was submitted to and approved by the Justice Department.

North Carolina's constitution to hold that voters in the state have no property right in being eligible for office.

The court of appeals affirmed, extending the Rodriguez rationale of preserving the mandate of the previous election to interim appointments for judges. The court made no mention of Elrod v. Burns, 427 U.S. 347, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976), or Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287, 67 L. Ed. 2d 574 (1980), or the diversity of cases decided pursuant to them.

REASONS FOR GRANTING THE WRIT

A. The Fourth Circuit's approval of a strict political test for filling interim judicial vacancies demonstrates a conflict among the Circuits.

By its decision below, the Fourth Circuit has condoned the use of political party affiliation as a prerequisite for public employment. Although the present case involves interim appointments to vacancies in elective judicial offices

rather than dismissals and hirings pursuant to a change in state administration, the statutory mandate of party affiliation in this case involves the same first amendment considerations as those developed under the line of "political patronage" decisions of this Court. As will be discussed within, an interim appointment to an office of this kind is tantamount to permanent employment. Thus, this decision upholds a type of patronage hiring for the state judiciary.

Since the decisions in Elrod and Branti, the question of whether, and to what extent, political affiliation may be used as grounds for employment decisions other than dismissal has remained open, and has divided the lower courts which have addressed the issue. These opinions have opened the door to various interpretations among the lower courts so that they are in need of guidance as to the

proper extent of the first amendment in employment practices.

The Court in Elrod failed to attain a majority. The plurality opinion strongly suggested that any government action which conditioned the receipt of a public benefit on some sacrifice of first amendment rights would be invalid. Elrod at 357-358. The concurrence, however, strictly limited the decision to a finding that a non-policymaking, nonconfidential government employee cannot be discharged solely for his political beliefs. Id. at 374-375.

Branti did away with the "policymaker" and "confidential" determinations in favor of a somewhat different test: whether "party affiliation is an appropriate requirement of the public office involved." Branti at 518. Further, although Branti limited itself to dismissals, the opinion recognized that political

affiliation formed a dubious justification for "either the selection or retention" of assistant public defenders. The Fourth Circuit, in refusing to interpret Elrod and Branti to include political hirings as well as firings, has taken a position which contradicts that taken by the Third, Sixth and Seventh Circuits.

The Fourth Circuit's refusal to consider the first amendment liberties in this hiring case agrees with previous decisions of that court. Delong v. United States, 621 F.2d 618 (4th Cir. 1980), presented the issue of whether a politically-motivated transfer or reassignment of an employee fell within the Branti rule. The Fourth Circuit withheld judgment on the facts presented, but ruled that Elrod and Branti only proscribed politically-motivated dismissals, or "those practices which are the substantial

equivalent of dismissal." Delong at 623-624. The court remanded the case for a determination of whether this particular reassignment was so severe as to force the employee to choose between resigning his position and surrendering his first amendment rights.

Although the test set forth in Delong focuses on the extent to which an employee is threatened with actually losing his job, the Fourth Circuit previously expressed doubt as to whether Elrod would apply even to politically-motivated failures to reappoint. Ramey v. Harber, 589 F.2d 753, 757 (4th Cir. 1978), cert. denied 442 U.S. 910 (1979). An applicant who is refused consideration for employment based strictly on political affiliation is afforded no protection whatsoever under the present Fourth Circuit interpretation.

Other courts, as well as commentators, have expressed a contrary interpretation of the first amendment protections afforded in this area. The Sixth Circuit, Seventh Circuit and possibly the Third Circuit as well have taken the position that the first amendment also prohibits a failure to hire based solely on political affiliation.

Avery v. Jennings, 786 F.2d 233 (6th Cir. 1986), addressed whether the principle prohibiting political discharge of government employees established in Elrod and Branti also applied to political hiring decisions by local elected officials. The court held that the first amendment prohibited official hiring policies based solely on political considerations, but upheld the system at issue which relied on recommendations from friends, relatives and political allies to fill vacancies. In so holding, the court distinguished between proscribed statutory requirements

of political affiliation, as in United Public Workers v. Mitchell, 330 U.S. 75 (1947), and Wieman v. Updegraff, 344 U.S. 183 (1952) and the permissible consideration of affiliation, among other factors, in hiring decisions. Other courts, without ruling on the issue directly, have cited Avery with approval. See, Cox v. Thompson, 635 F. Supp. 594 (S.D. Ill. 1986); Rutan v. Republican Party of Illinois, 641 F. Supp. 249 (C.D. Ill. 1986).

This view has also been reached in decisions by the Third and Seventh Circuits. "In general, a state may not condition hiring or discharge of an employee in a way which infringes his right of political association." Rosenthal v. Rizzo, 555 F.2d 390, 392 (3rd Cir.), cert. denied 434 U.S. 892 (1977). Subsequently the Third Circuit referred to this statement from Rosenthal as dicta,

but assumed for purposes of argument that Elrod would apply to hirings. Mazus v. Department of Transportation, 629 F.2d 870 (3rd Cir. 1980), cert. denied, 449 U.S. 112 (1981).

In Shakman v. Democratic Organization of Cook County, 481 F. Supp. 1315 (N.D. Ill 1979), the court examined Elrod together with prior decisions of the Seventh Circuit (authored by then-Circuit Judge Stevens, who took no part in the Elrod decision). The court concluded after a lengthy discussion that the Elrod plurality is "in accord with the law of this circuit, and is directly and equally applicable to patronage hiring and promotional practices." Id. at 1353. This ruling eventually led to another judgment in the same case, "to attempt to eliminate political considerations in the hiring of government employees." Shakman v. Democratic Organization of Cook County, 569

F. Supp. 177, 178 (N.D. Ill. 1983). Both of these decisions have been accepted as precedent by the Seventh Circuit. Tomczak v. City of Chicago, 765 F.2d 633 (7th Cir. 1985).

Petitioner's case presents a much needed opportunity for this Court to exercise its supervisory capacity by dispelling the obvious discrepancies in first amendment interpretation. Commentators have also observed, with concern, this divergence of rulings among the lower courts. Note, Limitations in Patronage Employment Practices, 49 U. Chi. L. Rev. 181 (Winter 1982); The Supreme Court, 1975 Term, 90 Harv. L. Rev. 56, 195 (1976). While these commentators have noted problems of proof in hiring cases, such problems do not exists in the case at bar. The North Carolina statute, by mandating political affiliation, avoids these difficulties and

provides the Court with an appropriate means to unify the law on political employment practices.

B. The Fourth Circuit's decision presents an important question regarding the application of Rodriguez v. Popular Democratic Party to the area of judicial appointments.

The decisions of both the Fourth Circuit and the trial court relied principally on this Court's decision in Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982). Rodriguez upheld a Puerto Rico statute allowing the party of a vacating legislator to designate his replacement. Besides the differences between North Carolina's and Puerto Rico's constitutions (discussed infra), the factors involved in filling a legislative vacancy discussed in Rodriguez are not the same as those involved in filling vacancies in the judiciary.

The reasons for upholding the legislative vacancy statute in Rodriguez, i.e.

to preserve the legislative balance created in the preceding election and to avoid the cost of a special election, have no application to judicial vacancies. While Puerto Rico's constitution compelled a certain political mark-up in the legislature, North Carolina has no such compelling interest in maintaining a partisan judiciary. The decision below ignores the important distinctions that exist between the legislature and the judiciary by holding that, as in Rodriguez, the party preference shown by the voters should be maintained.

The most recent complete survey of state judicial election methods shows that elections, either partisan or non-partisan, remain the most frequent method of initial judicial selection used. Dubois, State Trial Court Appointments: Does the governor make a difference? 69 Judicature 20 (June-July 1985). However,

in states which utilize an election system, a majority of the judges serving are not initially elected, but rather appointed by the governor to fill mid-term vacancies. Id.; P. Dubois, From Ballot to Bench: Judicial Elections and the Quest for Accountability, (Univ. of Tex. Press 1980). Since studies show these appointed judges are overwhelmingly favored in their first electoral bids following appointment, Id., the vacancy-filling process takes on added significance. Therefore, the ruling by the Fourth Circuit has the potential to affect a large part of the permanent judiciary, and not just occasional temporary stand-ins.

Petitioner submits, therefore, that this Court make clear the limits of Rodriguez, and refuse to allow its use as precedence in the area of judicial appointments.

C. The Fourth Circuit's holding that a North Carolina resident and voter has no right under state law to be eligible to state office directly conflicts with the rulings of the North Carolina Supreme Court.

Federal courts, in applying state law, are bound by the interpretation placed on state statutes by the highest courts of that state, Bank of Heflin v. Miles, 621 F.2d 108 (5th Cir. 1980), or if no such interpretation is available, the federal court must apply the law as it appears the highest state court would rule. Commercial Union Insurance Co. v. Ford Motor Co., 640 F.2d 210 (9th Cir.), cert. denied, 454 U.S. 858 (1981). The decision below interprets sections of the Constitution of North Carolina without reference to their historical development or to the prior interpretations given these sections by North Carolina courts.

Article VI, Section 6, of the Constitution of North Carolina (set out at page ^C) provides that all voters shall

be eligible for election to office. The court of appeals interpreted this to mean that not all voters are eligible for appointment to office, and that the General Assembly could, pursuant to N.C. Const. art. IV, § 10 (set out at page ^C), restrict eligibility for appointments. Although the North Carolina courts have not ruled on the eligibility section of the constitution since it was amended in 1970, prior rulings of the North Carolina Supreme Court and the history of the 1970 amendment establish petitioner's property right in being eligible to appointive or elective office.

The provisions of section 6 are similar to those that have been in the constitution since 1868.[2] The prior

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[2] As part of the Reconstruction Acts of 1868, Congress readmitted North Carolina to the Union on the express condition that it not change its constitution regarding the suffrage of its citizens. Reconstruction Act of 1868, ch. 70, 40th Cong., 2d Sess. (1868).

section stated, in part, that "[e]very voter, except as hereinafter provided, shall be eligible to office...[.]" N.C. Const. of 1868 art. VI, § 4. In 1900, the section was amended to read: "Every voter in North Carolina, except as in this article disqualified, shall be eligible to office." N.C. Const. of 1868 art. VI, § 7 (1900).

North Carolina courts have repeatedly held this provision to mean that the legislature cannot add qualifications of eligibility to office. In Spruill v. Bateman, 162 N.C. 588, 77 S.E. 768 (1913), the court reviewed a challenge to a statute requiring a county recorder's court judge to be a licensed attorney. Citing article VI, section 7, of the North Carolina Constitution of 1900, the court held:

> The General Assembly cannot render any "voter" ineligible for office by exacting any additional qualifications,

> as by prescribing in this instance that the candidate shall be "a licensed attorney at law," any more than it could prescribe that he should own a specified quantity of property, or be of a certain age or race or religious belief or possess any other qualification not required to make him a voter.

Id. at 769.

The court went on to discuss the underlying intent of the Reconstruction Constitutions in granting "every voter" eligibility to office:

> A newly emancipated element had been admitted to suffrage, and it was rightly anticipated that at some future day there might be a majority in the General Assembly unfavorable to their holding office, so that provision was made that "every voter," except as disqualified by the Constitution, should be eligible "to office." The broadest word is used showing that the eligibility was to any and every office.

Id. (emphasis added.) Smith is not disqualified by any provision of the Constitution, article VI, section 8.

This broad interpretation given to an individual's constitutional rights was reaffirmed in Bickett v. Knight, 169 N.C. 334, 85 S.E. 418 (1915). In Bickett, the court emphasized that article VI, section 6, gave to every voter the right to hold any office, whether established by the constitution itself, or by act of the General Assembly, regardless of whether the office is elective or appointive.

While Bickett ruled on whether women could be appointed to the office of notary public, the court later addressed the issue of political affiliation as it relates to office-holding. In Cole v. Sanders, 174 N.C. 112, 93 S.E. 476 (1917), the court again followed the rationale of Spruill to hold that "every voter" be eligible to office. It went on to discuss political affiliation as a qualification for office:

> It is very apparent that if the legislature can prescribe that a part of the commission must belong to the opposite political party; if it can take into consideration as qualification, or disqualification, the political or religious or other views of candidates, it can prescribe that all the members of the commission or candidates for any office, even members of the legislature, shall be of the same party, or of the same race, or of the same church affiliations, as the majority of the General Assembly. It is true that this is a very improbable action, but it was because it was deemed probable that some future legislature might prescribe race or color as a qualification for office that this enactment was put in the Constitution, with a view of preventing any disqualification of any voter "other than those in [that] article disqualified."

Id., 93 S.E. at 477.

These cases make it clear that the Constitution of North Carolina vests in all qualified voters the right to be eligible for office. To qualify for the office of judge, the voter must also be a licensed attorney. N.C. Const. art. IV,

§ 22. Logically, as the Fourth Circuit pointed out, simply because all judicial office-holders must be lawyers does not dictate that all lawyers are eligible to be judges. However, under North Carolina's constitution, since Smith is both a voter and a lawyer, he possesses a property right in being eligible for this judicial office.

In 1970, the qualifications section of article VI was amended to read, as it presently does, that every voter shall be eligible for election to office. While the North Carolina courts have yet to rule on the amended section 6, their manner of constitutional interpretation demands that "a court must examine the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purpose sought to be accomplished by its promulgation." Sneed v. Greensboro Board

of Education, 299 N.C. 609, 264 S.E.2d 106 (1980).

As pointed out in the Report of the North Carolina State Constitution Study Commission to the North Carolina State Bar and the North Carolina Bar Association (see appendix), the old version of section 6 was viewed as restricting the ability of state officials to appoint non-North Carolinians to office. The Commission considered that since all voters were eligible for election or appointment, then only voters were eligible. In order to allow for the appointment of "outsiders" to office, the provision was revised so that all voters are eligible for election. The implication as to appointments is that others besides voters are now eligible and not, as the court of appeals held, that some voters are no longer eligible. See also Saunders, State Constitutional

Revisions -- North Carolina, Popular Government (Sept., 1969).

After the 1970 amendments to article VI, the disqualifications provision in section 8 still reads, "[t]he following persons shall be disqualified from office..." as it did prior to 1970. Section 8, which sets out the only disqualifications for office, still provides for the disqualifications for appointive as well as elective offices. The ruling that some voters can be further disqualified for appointment renders section 6 inconsistent with section 8.

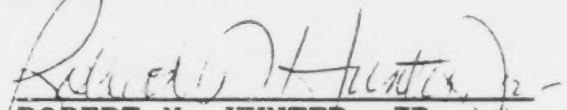
The office of district court judge is a constitutional and elective office. N.C. Const. art. IV, § 10. Being an elective office, it is thereby encompassed within article VI, section 6, "Eligibility to Elective Office." The nature of the office does not change depending upon how a vacancy is filled. David W. Smith,

III, is eligible for election or appointment to any office, including that of district court judge. By ignoring the prior North Carolina case law and constitutional history, the Fourth Circuit has deviated from that method of interpretation which the North Carolina courts themselves would use in construing these provisions. The resulting finding that Smith has no property right protected by due process and equal protection is thus obtained only by a departure from accepted standards of jurisprudence. Petitioner urges this court to review the Fourth Circuit's consideration of his state-created rights.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment of the court of appeals for the Fourth Circuit.

RESPECTFULLY SUBMITTED, this 31st day of July, 1987.



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served a copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT on the following parties in interest by depositing a copy thereof in the care and custody of the United States Postal Service, first-class postage prepaid, addressed to said parties at their last known address as listed below in the manner prescribed by law:

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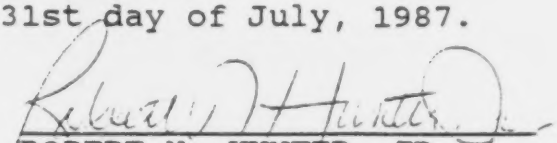
This the 31st day of July, 1987.



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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-86-0040-M

DAVID W. SMITH, III,

Plaintiff,

v.

JAMES G. MARTIN, in his capacity as Governor of the State of North Carolina; LACY H. THORNBURG, in his capacity as Attorney General of the State of North Carolina; FRANKLIN E. FREEMAN, JR., in his capacity as Director of the Courts of the State of North Carolina; TIMOTHY L. PATTI; ROBERT W. CLARK; and WILLIAM J. ALLRAN, III,

Defendants.

O R D E R

Section 7A-142 of the General Statutes of North Carolina reads as follows:

§ 7A-142. Vacancies in office.

A vacancy in the office of district judge shall be filled for the unexpired term by appointment of the Governor from nominations submitted by the bar of the judicial district. If the district court judge was elected as the nominee of a political party, then the district bar shall submit to

> the Governor the names of three persons who are residents of the district who are duly authorized to practice law in the district and who are members of the same political party as the vacating judge; provided that if there are not three persons who are available, the bar shall submit the names of two persons who meet the qualifications of this sentence. If the district bar fails to submit nominations within thirty days from the date the vacancy occurs, the Governor may appoint to fill the vacancy without waiting for nominations. (Emphasis added.)

Donald E. Ramseur, a state court district judge in Gaston County, Judicial District 27A, resigned. Ramseur had been elected to the job of judge as the nominee of the Democratic Party. Pursuant to Section 7A-142, the lawyers of Judicial District 27A met in December of 1985 to nominate candidates for appointment to the seat vacated by Judge Ramseur. They recommended three lawyers: Timothy L. Patti; Robert W. Clark; and William J. Allran, III. Their names were submitted

to Governor James G. Martin. All three are Democrats.

Plaintiff, David W. Smith, III, a Gaston County lawyer, a Republican, and a registered voter, brought this suit seeking to have the statute declared invalid. Smith alleges that he wanted the job and would be a candidate for the job but that he was unlawfully deprived of the opportunity by the statute, § 7A-142, previously quoted. He contends that it violates his rights of freedom of association and equal protection of laws, and deprives him of liberty and property without due process of law, under color of state law, and that it also violates the Constitution of the State of North Carolina.

The court finds that under these facts the plaintiff has standing to raise the federal constitutional questions presented by the suit, McMichael v.

County of Napa, 709 F.2d 1268 (9th Cir. 1983), and that a present case or controversy exists. Steffel v. Thompson, 415 U.S. 452 (1974). The court finds, however, that the Eleventh Amendment bars consideration of the state constitutional claims by this court. See Mayberry v. Dees, No. 79-1204, -1205, slip op. (4th Cir. January 15, 1981); Dawkins v. Craig, 483 F.2d 1191, 1194-95 (4th Cir. 1973).

This court does not like the statute, but has concluded that it does not violate plaintiff's rights under the United States Constitution.

This conclusion is based in large part on Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982). In that case, a member of the Puerto Rico House of Representatives died before the end of his term. Puerto Rican statutes gave the political party of the deceased representative the authority to appoint his

interim successor. That party held a primary election in which only its members were permitted to vote. The winner was sworn in as the new representative for the district. Appellants, qualified electors in the district who were not affiliated with the party of the deceased representative, challenged the election.

The Supreme Court held that the rights of appellants to freedom of association and equal protection were not violated by their exclusion from the special election to select the interim representative. It held that the Puerto Rican legislature could lawfully choose a method of filling interim vacancies which was calculated to perpetuate the recorded party preference of the voters, rather than a method such as appointment by the governor or some other elected official, particularly where such official was a member of a different party.

The differences, whatever they may be, between the politics of choosing judges and the politics of choosing legislators do not justify this court in disregarding Rodriguez.

Here, as in Rodriguez, the governor is not of the same political party as the former holder of the office in question. Governor Martin is a Republican and Judge Ramseur is a Democrat. It is reasonable, and constitutionally permissible, for the North Carolina General Assembly to conclude that voter choices should be respected; that many of the people who would vote for winners like Judge Ramseur would do so because of party affiliations and that, therefore, choices of interim successors from members of the same party would more probably reflect the will of the voters than would choices of successors not of that same party.

The court further concludes that the statute does not violate plaintiff's right under the United States Constitution to due process of law because plaintiff has no property right in being eligible to be the interim replacement for Judge Ramseur. Plaintiff argues that he has such a property right because of Section 22 of Article IV of the Constitution of the State of North Carolina, which reads in part: "Only persons duly authorized to practice law in the courts of this State shall be eligible for . . . appointment as . . . Judge of District Court." Plaintiff contends that this section making non-lawyers ineligible also means that all lawyers are eligible for appointment as interim district court judges, and that, therefore, he has a property right in such eligibility. He argues that § 7A-142 deprives him of this state created property right without due process of law.

I am unable to agree with this non sequitur. The Constitution of the State of North Carolina does not give individual lawyers in the state a property right to interim appointments to the district court. Section 10 of Article IV specifically states that "[v]acancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law." (emphasis added) The North Carolina General Assembly in § 7A-142 has so prescribed. Consequently, § 7A-142, by making plaintiff ineligible to replace Judge Ramseur, does not violate due process.

IT IS THEREFORE ORDERED:

1. That plaintiff's claims under the North Carolina Constitution are DISMISSED;

2. That plaintiff's motion for summary judgment is DENIED; and

3. That defendants' motion for summary judgment is ALLOWED.

Defendant shall tender a proposed judgment within ten days of the entry of this order.

This 31 day of July, 1986.

s/James B. McMillan
JAMES B. McMILLAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-2134

DAVID W. SMITH, III,

Plaintiff - Appellant,

v.

JAMES G. MARTIN, in his capacity as Governor of the State of North Carolina; LACY H. THORNBURG, in his capacity as Attorney General of the State of North Carolina; FRANKLIN E. FREEMAN, JR., in his capacity as Director of the Administrative Office of the Courts of the State of North Carolina; TIMOTHY L. PATTI; ROBERT W. CLARK; and WILLIAM J. ALLRAN, III,

Defendants - Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge. (C/A 86-0040-M)

Argued: February 4, 1987
Decided: April 2, 1987

Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and MICHAEL, United States District Judge for the Western District of Virginia, sitting by designation.

Robert N. Hunter, Jr. (Hunter, Hodgman, Greene, Donaldson, Cooke & Elam on brief) for Appellant; Isham Barney Hudson, Jr., Special Deputy Attorney General (Lacy H. Thornburg, Attorney General; Jean A. Benoy, Senior Deputy Attorney General on brief) for Appellees.

PER CURIAM:

This case turns on the proper interpretation and application of certain laws of the State of North Carolina relating to the filling of unexpired terms of judicial officers.

The factual basis for the controversy is relatively briefly stated. In December, 1985, Judge Ramseur resigned as District Court Judge of the Twenty-Seventh Judicial District, effective December 31, 1985. Thereafter, the president of the Twenty-Seventh Judicial District convened a meeting of the members of that district bar for the purpose of nominating candidates for appointment to fill the vacancy.

Judge Ramseur had been elected to the office of District Judge as the nominee of the Democratic Party, and the plaintiff is a licensed attorney who had registered as a Republican. The Twenty-Seventh Judicial Circuit Bar nominated three persons, all members of the Democratic Party, whose names were to be submitted to the Governor of the State of North Carolina, who, pursuant to the constitutional and statutory authority vested in that office, would make the appointment from these three nominees to fill the remaining portion of the term to which Judge Ramseur had initially been elected.

Article IV, § 10, of the Constitution of North Carolina (hereinafter North Carolina Constitution) provides in part that, "[v]acancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law."

Another pertinent provision of the North Carolina Constitution is Article VI, § 6, which provides in part that, "[e]very qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office."

It is important to note that this provision of the Constitution relates to "election by the people to office." This section, on which the plaintiff below relies so heavily, does not modify the language first quoted from the Constitution, to the effect that vacancies in the office of District Judge shall be filled for the unexpired term in a manner prescribed by law.

Pursuant to the grant of authority in Article IV, § 10, of the North Carolina Constitution to adopt appropriate statutes, North Carolina has adopted North Carolina

General Statute § 7A-142, reading as follows:

> A vacancy in the office of district judge shall be filled for the unexpired term by appointment by the Governor from nominations submitted by the bar of the judicial district. If the district court judge was elected as the nominee of a political party, then the district bar shall submit to the Governor the names of three persons who are residents of the district who are duly authorized to practice law in the district and who are members of the same political party as the vacating judge; provided that if there are not three persons who are available, the bar shall submit the names of two persons who meet the qualifications of this sentence. Within 60 days after the district bar submits nominations for a vacancy, the Governor shall appoint to fill the vacancy. If the district bar fails to submit nominations within 30 days from the date the vacancy occurs, the Governor may fill the vacancy without waiting for nominations.

Under the authority of this statute, enacted pursuant to the Constitution of North Carolina, art. IV § 10, the district bar submitted three names of persons of

the same party as the vacating judge, so that the Governor might make his appointment of one of those three.

On this factual background, the plaintiff asserts, first, that as a registered voter and licensed attorney, he possesses a liberty or property interest in being eligible for the remainder of the term of this office in North Carolina, second that the defendants deprived the plaintiff of his state-created right to be eligible for office without equal protection or due process of law, and third, that the defendants deprived the plaintiff of his constitutional rights to free speech and freedom of association without equal protection or due process of the law.

As to the first two stated issues, this court can find no basis for saying that anything in the North Carolina statutes deprives the plaintiff of liberty

or property interests in being eligible for office in North Carolina, nor can it find that the defendants, under this statutory pattern, have deprived the plaintiff of his state-created right to be eligible for office without due process and without equal protection. The provisions of the constitution and the laws of the State of North Carolina on which the plaintiff relies establish, in fact, eligibility for election to office, and do not deal with the question of filling vacancies in judicial office. Article IV, § 10, and the accompanying statutory provisions relate solely to the question of filling vacancies in the district court.

The provisions relating to filling such a vacancy are clearly supported by the state's interest in maintaining the will of the people as reflected in the general election vote which brought the vacating judge to the bench in the first

place. If we assume, as we do, that under North Carolina's system, the electorate is willing to choose a member of a particular party to fill the judicial office, then it is appropriate for the General Assembly to see that the will of the electorate is carried forward in replacing the judicial officer who steps down before fulfilling the term of office to which that officer has been elected.

The deprivation of due process argument is further advanced by the plaintiff on the theory he has acquired a property right by virtue of Article IV, § 22, of the North Carolina Constitution which provides that, "Only persons duly authorized to practice law in the courts of this State shall be eligible for appointment as a . . . Judge of District Court." From this, the plaintiff reasons that making nonlawyers ineligible must also mean that all lawyers are eligible

for appointment and from this, the plaintiff derives the thought that he has property right in that eligibility.

As indicated by the court below, this is a non sequitur, in light of the fact that the Constitution of North Carolina gives no individual lawyer a property right to interim appointment to the district court. Contrary to that assertion, Article IV, § 10, quoted previously, indicates that such vacancies shall be filled for the unexpired term in a manner prescribed by law, and the General Assembly has thus prescribed a method for filling the unexpired term.

Certainly, there is ample constitutional authority for the General Assembly of the State of North Carolina to prescribe the methodology by which a replacement for a vacating judge should take place, and the General Assembly of North Carolina has done so in this case on a basis which

is defensible, assuming that judicial offices are initially to be filled by election by the qualified electors of the district to be served by that officer.

Turning to the third issue raised by the plaintiff, namely, deprivation of freedom of speech and freedom of association without due process of law, this court finds the argument equally without merit. The provisions of the Constitution heretofore cited apply equally to all persons within the confines of North Carolina, and they provide a process of law by which the actions now challenged are to be undertaken. In light of the pertinent constitutional provisions, there can be no argument that the authority of the General Assembly was somehow overstepped in adopting the statute prescribing the manner in which the interim replacement is to be selected and, so far as the record discloses, that process was

duly carried forward by the bar association and presumably by the Governor in selecting the replacement for Judge Ramseur.

The court below dismissed consideration of the plaintiff's claims of violation of the state constitution under the eleventh amendment, finding that that amendment barred the court from consideration of the state constitutional claims. See Mayberry v. Dees, 663 F.2d 502, 505 (4th Cir. 1981), cert. denied, 459 U.S. 830 (1982); Dawkins v. Craig, 483 F.2d 1191, 1194-95 (4th Cir. 1973). The court below discussed at some length the case of Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982). In Rodriguez, the Puerto Rico statutes gave the political party of a deceased representative in the House of Representatives of the Puerto Rico legislature the right to appoint an interim successor for the deceased representative. In Rodriguez, after the death

of a representative, the party held a primary election in which only its members voted and from that vote, they selected a winner who was sworn in as the new representative.

The Supreme Court held that the Puerto Rico legislature could properly and lawfully select a procedure for filling interim vacancies, which procedure was calculated to perpetuate the recorded party preference of the voters, assuring that the party preference was maintained by the system which they devised, rather than having the vacancy filled by some other official who might very well be a member of a different party and who would perhaps favor a member of his party as opposed to the party of the deceased representative.

Applying the rationale of Rodriguez to the facts in this case, it is apparent that the constitutional and statutory

scheme in North Carolina for filling the unexpired term of office of a judicial officer comports well with the concept of maintaining for that unexpired portion of the term the party preference shown by the voters in the election itself.

For the reasons stated, and on the strength of the detailed opinion below, the action of the United States District Court is

AFFIRMED.

EXCERPT FROM
REPORT OF THE NORTH CAROLINA STATE CONSTITUTION STUDY COMMISSION TO THE NORTH CAROLINA STATE BAR AND THE NORTH CAROLINA BAR ASSOCIATION

Article VI. Suffrage and Eligibility to Office

The substantive changes proposed in Article VI are few.

The constitution now bars from voting and office holding a person who has been found guilty of committing a felony against the State of North Carolina, unless he has been restored to the rights of citizenship in a judicial proceeding. The proposed constitution extends that bar to those who have been convicted of felonies against the United States or another state.

It is desirable, in the interest of ease and uniformity of administration as well as voter understanding, that the election laws of this State exhibit a

greater degree of uniformity than is now required by the constitution or found in the laws. Accordingly, proposed Art. VI, § 3, requires that all laws governing the registration of voters and the conduct of elections for federal, state, district, and county offices be uniform throughout the State. The General Assembly is required to enact general laws (thus permitting classification on the basis of registration and the conduct of elections for all municipal officers. (Variations by local act would not be prohibited as to elections other than for officers.)

Art. Vi, § 6, now provides that "Every voter...shall be eligible to office." The State Supreme Court says that this provision means also that only voters are eligible to office. It is commonly supposed that it is also necessary that a person be a registered voter in the jurisdiction that he is to serve. This

has created problems for state and local governments in filling appointive positions that are at least technically classified as offices and for which it may be necessary to seek applicants from outside the jurisdiction. One not already a registered voter of the jurisdiction is not eligible for appointment. As a practical matter, this restriction is often overlooked because the necessities of governmental recruiting force an employer to look outside the boundaries of the jurisdiction. Proposed Art. VI, § 6, deals with this problem by providing that every qualified voter shall be eligible for election to office (and by inference that only qualified voters are eligible for election to office). Proposed Art. VI, § 8, makes this clear by requiring that a candidate for an elective office be qualified to vote in an election for that office. These changes leave the General Assembly

with the authority to determine to what extent the holders of appointive offices must be qualified voters in the jurisdiction they serve, either at the time of appointment or later.

The dual office-holding provision has been moved from Article XIV to become Art. VI, § 9. While extensively rewritten, the chief effect of the revision is to enable the General Assembly to permit by general law the concurrent holding of two or more appointive offices, or one elective and one or more appointive offices. This will allow the General Assembly to do directly what is now done by assigning the duties of one office to be performed by another, or by declaring the holder of an office to be a "commissioner for special purpose," or by other indirect means. Thus, for example, the General Assembly could provide that the same man

can be both tax collector and tax supervisor. Otherwise, the proposed ban on double office holding is fully as effective as the present one. It expressly forbids the holding of two elective offices at the same time.

We recommend the omission of the obsolete and unconstitutional grandfather clause under which certain illiterate males were allowed to register prior to December 1, 1908, and other obsolete transitional provisions from the 1900 suffrage amendment.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 86-2134

David W. Smith, III,

Appellant,

versus

James G. Martin, etc., et al.,

Appellees.

On Petition for Rehearing

O R D E R

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Michael, United States District Judge, sitting by designation, for a panel consisting of Chief Judge Winter, Judge Sprouse and Judge Michael.

For the Court,

s/John M. Greacen
CLERK